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No. 94-761

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARTHUR CALDERON, Warden of San Quentin Prison, and
DANIEL LUNGREN, Attorney General of the State of California

Petitioners,

v.

MELVIN MEFFERY WADE,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of California

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a jury instruction that erroneously omits an essential element in the definition of a death-qualifying special circumstance fails to narrow the class of death-eligible crimes sufficiently to comply with the Eighth Amendment?

2. Whether the test for error in ambiguous jury instructions promulgated in Boyde v. California is applicable to a penalty phase jury instruction that is erroneous on its face?

3. Whether the Court of Appeals correctly determined that trial counsel's unreasonably deficient performance denied respondent a fair and reliable penalty trial when counsel completely failed to investigate and present readily available compelling mitigation evidence and instead asked the jury to sentence respondent to death?

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STATEMENT OF THE CASE

Petitioner has accurately stated the procedural history of the case, with the exception of inaccuracies or omissions for which respondent submits the following corrections and additions.

On automatic appeal of respondent's conviction and sentence of death, on January 2, 1987, the California Supreme Court affirmed the murder conviction and torture murder special circumstance finding, but reversed the finding of the heinous, atrocious, or cruel special circumstance and the penalty of death. People v. Wade, 729 P.2d 239 (Cal. 1987). After the removal of three justices, a newly constituted California Supreme Court granted the State's petition for rehearing on March 26, 1987. On rehearing, the California Supreme Court again reversed the heinous, atrocious, or cruel special circumstance finding, but affirmed the conviction for murder, the torture murder special circumstance finding, and the judgment of death. People v. Wade, 750 P.2d 794 (Cal. 1988).

On May 16, 1994, a divided panel of the Ninth Circuit issued three separate opinions in respondent's appeal. One judge, concurring in part and dissenting in part, found that defense counsel had been ineffective at all stages of respondent's trial and that the special circumstance instruction was constitutionally deficient. A second judge, concurring in part and dissenting in part, disagreed with each of those findings. The majority opinion, by the third judge, found that the torture-murder special circumstance instruction failed to

meet the requirements of the Eighth Amendment, and that defense counsel was ineffective at only the penalty phase of the trial. Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994). Respondent, through both his regular and special counsel, filed petitions for rehearing and a suggestion for rehearing en banc, and petitioner filed a petition for rehearing and a suggestion for rehearing en banc. On September 22, 1994 all petitions for rehearing were denied, and no active judge of the Ninth Circuit requested a vote on whether to rehear the matter en banc. Appendix C, Pet. for Cert. at 189-190.

STATEMENT OF FACTS

A. The State Court Trial

1. The Crime

Melvin Wade began living with Irabell Strong in Los Angeles in June of 1980. They were married in September, 1980, and moved into a one bedroom motel apartment in San Bernardino, California, in February, 1981. Four of Ms. Strong's minor children -- Alexis (age 9), Syeeta (age 8), Penny (age 12), and Joyce (age 10) -- lived with them. RT 2843-2845, 2893.[1] Despite Mr. Wade's attempts to support the family, they had little money and Ms. Strong was receiving Aid to Families with Dependent Children. RT 2895. Initially, Mr. Wade was consistently kind and considerate to all of the children, but, as the pressures of

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[1] Record references are denoted as follows: State court trial transcript -- RT; State court clerk's transcript -- CT; United States District Court Evidentiary Hearing -- (date) EH; United States Court of Appeals Excerpts of Record (3 volumes I-III) -- (vol.) ER.

the family's financial situation worsened, his attitude and demeanor changed. By the time they moved to San Bernardino, Mr. Wade had begun to lose his temper and physically abuse the children. RT 2847.

The incidents in question began between 8:00 a.m. and 10:00 a.m. on April 10, 1981. Mr. Wade became upset with Joyce because of her hygiene. RT 2854. He beat her with his fists and sent her to her room; later in the morning he struck her with a wooden board. RT 2856, 2858, 2876. Ms. Strong testified that, in her view, Mr. Wade's actions were his attempts to punish Joyce. However, as the day progressed, Mr. Wade became hysterical, uncontrollable, and started acting like a madman; a view echoed by her daughter Penny. RT 2916-2918, 2937, 3114. It was while in this state that Mr. Wade committed the further acts that led to Joyce's death.

The acts committed by Mr. Wade while in this hysterical and uncontrollable state included placing Joyce in an army duffel bag and then placing the duffel bag in a crawl space above the bedroom ceiling; beating her when he fell while removing her from the crawl space; tying her around the neck with a dog leash while he beat her with his fists and a board; and kicking her chest. RT 2860, 2863, 2865, 2868, 2872, 2876, 2880-2883. During the course of the day, he lectured Joyce about having respect for her elders and told her he was Michael the Archangel. RT 2872, 2876.

During the early morning hours of April 11, the motel manager overheard the altercation and called the police. RT

2818, 2826. When the police knocked on the door, Mr. Wade answered and informed them that the family was having a dispute and that he was going to leave. Ms. Strong assured the police everything would be all right. RT 2794-2800. After the police left, Mr. Wade returned to the apartment and the motel manager saw him strike Ms. Strong in the parking lot and run off. RT 2833-2836. At Ms. Strong's request the motel manager again called the police. RT 2838.

Moments after the police arrived and found Joyce dead on the bedroom floor, Mr. Wade returned and surrendered to the police in the parking lot. RT 2801-2803. Mr. Wade was arrested and transported to the hospital to get a blood sample; en route he asked the officer if Joyce was really dead and said he had killed an innocent person and that he did not mean to hit her that hard. RT 3104, 4371. He also stated that he had been under great stress, that he was on welfare, and that he was receiving psychiatric treatment. RT 4372, 4376. On the afternoon of April 11, Mr. Wade told San Bernardino Police Detective Stephen Jarvis that he loved Joyce and all the children but that she had been a discipline problem. RT 4424, 4426.

2. State Court Proceedings

On April 15, 1991, a complaint filed in San Bernardino Municipal Court charged Mr. Wade with first degree murder and alleged two special circumstances, that the murder was especially heinous, atrocious or cruel, and that the murder was intentional and involved the infliction of torture. CT 13. Attorney Daniel

Greenberg was appointed to represent Mr. Wade at the preliminary hearing. An information filed in San Bernardino Superior Court on September 22, 1981, again alleged the murder and two special circumstances; Mr. Greenberg was reappointed to represent Mr. Wade at trial. CT 283-284, 288. On December 29, 1981, the court granted Mr. Greenberg's motion to be relieved, and appointed S. Donald Ames as counsel for Mr. Wade. Despite the change in counsel, trial remained set for the previously scheduled date of February 1, 1982. CT 298.

On January 20, 1982, Mr. Ames' investigator conducted a brief interview of Mr. Wade's mother; this was the only defense interview of a fact witness conducted prior to trial. II ER 90, 230-231. Mr. Ames secured the appointments of a psychologist (Dr. Rath), psychiatrist (Dr. Summerour), and neurologist (Dr. Hunt). Drs. Rath and Summerour each conducted introductory interviews of Mr. Wade, but did not provide counsel with any reports prior to trial; Dr. Hunt was appointed on January 29, 1982, with the understanding he could not conduct his testing until February 26, 1982. II ER 74, 239; III ER 40-41, 66. Nonetheless, the trial commenced on February 1, 1982. CT 394.

The prosecution presented the testimony of three eyewitnesses, Ms. Strong, Penny Taylor, and Alexis Taylor, who described the events set forth above, the pathologist who conducted the autopsy and a pediatrician. When the defense was scheduled to begin, Mr. Ames sought a mistrial because a defense expert had just uncovered a mental defense necessitating a plea

of not guilty by reason of insanity. The court denied the mistrial request but permitted entry of an insanity plea and continued the trial for two weeks so that a medical commission could examine Mr. Wade. Mr. Ames then presented a defense of insanity and diminished capacity. The defense centered on the assertion that during the homicide Mr. Wade was actually the alterpersonality "Othello" -- a demonic fiend who had plagued his psyche for years. The defense was presented entirely through the testimony of Drs. Rath, Chapman and Summerour.

In rebuttal, the prosecution presented two psychiatric experts who opined that Mr. Wade did not suffer from multiple personality disorder. They also presented co-workers who denied that he used the name "Othello," and Carol Amos, the mother of petitioner's twin sons. Notably, one prosecution psychiatrist, Dr. Hacker, opined that Mr. Wade was in fact psychologically disturbed and did not intend to kill the victim, but was overwhelmed by uncontrollable aggressive impulses in administering punishment to his stepdaughter. Ms. Amos testified that Mr. Wade used phencyclidine (PCP) and blamed his increasingly violent, abusive behavior towards her and their infant sons for the breakup of their relationship.

On surrebuttal, Ella Mae Edwards testified about Mr. Wade's violent behavior while he lived with her family, and she confirmed his abuse of PCP. The jury then viewed a four-hour videotaped interview of Mr. Wade in which the alterpersonality emerged. The final defense witness at the guilt phase was Dr.

Allison, who had conducted the videotaped interview. Inexplicably and contrary to the basis of the defense, he explained in detail why Mr. Wade did not suffer from a multiple personality disorder but suffered from possession syndrome.

The jury was then instructed on the applicable law. RT 6077-6110. The jury received instructions upon two theories from which they could arrive at a verdict of first degree murder: (1) that the murder was willful, deliberate and premeditated, or (2) that it was perpetrated by torture. RT 6092-6094. The jury was instructed as to the mental state elements of all available homicide verdicts and lesser included offenses, and the procedures to be used to arrive at their verdicts. RT 6095-6102. The court then instructed the jury as to the law applicable to the defense theories of diminished capacity and unconsciousness. RT 6103-6106. Finally, the court gave instructions applicable only to the special circumstance allegations. RT 6106.[2] The jury was then instructed on the elements of the "murder involving the infliction of torture" special circumstance allegation. RT 6107; Cal. Penal Code §190.2(a)(18).[3] After the arguments of

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[2] The jury was instructed as follows: "If you find the defendant in this case guilty of murder in the first degree, you must then determine if the murder was committed under one or both of the following special circumstances." CALJIC 8.80, California Jury Instructions, Criminal, 4th Ed. (West 1979), at 309-310.

[3] The jury was instructed as follows: "To find that the special circumstance, referred to in these instructions as murder involving the infliction of torture, is true, each of the following facts must be proved:

1. That the murder was intentional, and
2. That the murder involved the infliction of torture.

To prove the infliction of torture, the infliction of

counsel, the jury deliberated for less than two hours before returning their verdicts, finding, in a general verdict, Mr. Wade guilty of murder in the first degree, and finding both special circumstances to be true. RT 6232-6233.

At the sanity phase of the trial Mr. Ames chose not to present any evidence or argument, and the jury was instructed on the applicable law. III ER 239-240. After brief deliberations, the jury found that Mr. Wade was sane at the time of the homicides. RT 6283.

The prosecution presented no evidence at the penalty trial. The defense presented only Mr. Wade. He testified first as "Melvin," then, at Mr. Ames' insistence, the alterpersonality "Othello" emerged on the witness stand. RT 6301-6338. "Othello" proceeded to profanely challenge the jury to kill "Melvin," claiming that he intended to kill him anyway. After the noon recess, the prosecutor cross-examined Mr. Wade without any further testimony by the alterpersonality "Othello." RT 6339-6393. Mr. Ames' final argument, covering less than eight transcript pages, acknowledged that the jury had previously rejected the multiple personality defense; yet his final words to the jury were that petitioner would welcome a judgment of death as "the gift of life," freeing him from the psychological torment of his multiple personality. RT 6464-6472. After deliberating

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extreme physical pain must be proved no matter how long its duration.

Awareness of pain by the deceased is not a necessary element of torture." RT 6107; CALJIC 8.81.17, California Jury Instructions, Criminal, 4th Ed. (West 1979), at 326.

less than one day the jury returned a verdict of death. RT 6482.

B. Federal District Court Proceedings

On May 22, 1990, the district court held an evidentiary hearing on Mr. Wade's claim that he received ineffective assistance of counsel at trial. Mr. Ames testified that he was appointed to succeed Daniel Greenberg as Mr. Wade's attorney; Mr. Greenberg had not developed nor did he suggest any defense to his successor, and Mr. Ames put little or no stock in what he said. 5/22/90 EH 33, 36, 38. At the time of his appointment the case was not "trial ready." Mr. Ames felt the facts looked conclusive as to guilt and therefore the thrust of the defense had to be in the penalty phase. 5/22/90 EH 39, 52.

Mr. Ames acknowledged that when he began jury selection he had no theory of defense applicable to the guilt phase that involved the mental health experts who had been appointed to examine Mr. Wade. 5/22/90 EH 63. This was Mr. Ames' first case in which torture murder was at issue, yet he could not remember whether he did any research on the concept of torture murder. 5/22/90 EH 85. The bulk of his testimony in district court displayed his lack of familiarity with the contents of materials he received in discovery, II ER 212-350, with the reports and findings of mental health experts appointed to assist Mr. Greenberg, II ER 155-185, and with the reports of his own appointed experts, e.g. Dr. Robert Summerour, II ER 186-196.

Prior to trial Mr. Ames contacted Dr. Summerour and asked him to examine Mr. Wade for multiple personality disorder.

5/23/90 EH 7. Dr. Summerour interviewed Mr. Wade on January 13 and February 7 of 1992, but did not consult with Mr. Ames regarding his findings until later in February, after jury selection was almost complete. 5/23/90 EH 8-11. From their initial contact throughout Dr. Summerour's involvement in the case, Mr. Ames focused on his own desire to pursue a multiple personality defense. 5/23/90 EH 28.

Sharon Wade Curtis, Mr. Wade's older sister, was never contacted by Mr. Ames. Her only contact with anyone acting on Mr. Wade's behalf came during Mr. Greenberg's tenure as Mr. Wade's counsel, when a man came to get some pictures. 5/23/90 EH 75-76. As a young child, Ms. Curtis was physically and sexually abused by Jack Harrison, and she personally witnessed Mr. Harrison's physical and sexual abuse of her brother Melvin Wade. This conduct took place regularly over a period of years, when her mother was away from the home. 5/23/90 EH 70-72. No one from Mr. Wade's defense ever interviewed Ms. Curtis about potential mitigation, and the jury never heard her compelling testimony.

Carol Amos, the mother of Mr. Wade's twin sons, had a four year relationship with him; about eight months before their breakup she discovered that he was using PCP. 5/23/90/ EH 84. She and their sons were living with Mr. Wade when he injured his hand in an industrial accident and began to use PCP more frequently. 5/23/90 EH 89. Ms. Amos gave a tape-recorded interview to the prosecution in 1982, and then went to court the

next day to testify at trial. She was not contacted or interviewed by the defense at any time before or after she testified in court. 5/23/90 EH 91-94.

Sam Weiss, a Deputy Public Defender in San Bernardino for over twenty years, contradicted Mr. Ames' claim that PCP intoxication could not provide a viable defense in a homicide trial in that community. At a previous trial, Mr. Weiss had presented expert testimony on the effects of prior chronic abuse of PCP and how it can alter a person's conduct or judgment, and the jury returned a voluntary manslaughter verdict. 5/23/90 EH 64-72.

Tom McDonald, an experienced capital defense lawyer, reviewed Mr. Ames' preparation for trial and found it wanting in several respects, most significantly the failure to pursue any corroboration for Mr. Wade's statements concerning the abuse he suffered as a child. He opined that a failure to provide the jury with corroboration from independent sources undermines the credibility of the entire defense because jurors perceive the defendant has a motive to lie or malinger. 5/24/90 EH 17-18. Based on the discovery materials available to Mr. Ames prior to trial and the transcript of the preliminary examination, Mr. McDonald did not believe Mr. Wade's case could adequately be investigated in four weeks, the time period Mr. Ames represented Mr. Wade before beginning jury selection. 5/24/90 EH 54.

David Whitney, testifying as an expert for the State, agreed that a competent advocate is obliged to obtain any and all

evidence in mitigation, including social history information from third parties other than the defendant. 5/24/90 EH 115-116. Mr. Whitney also opined that the videotaped interview of Mr. Wade that was shown to the jury was not an effective presentation of the multiple personality defense. 5/24/90/ EH 134.

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REASONS FOR DENYING THE WRIT

The opinion of the United States Court of Appeals, which affirmed in part and reversed in part respondent's conviction and sentence, presents no important questions of federal law requiring this Court's review. See S. Ct. R. 10(c). The Court of Appeals' followed this Court's well-delineated precepts for the manner in which jury instructions should be analyzed when it considered the validity of the special circumstance instruction at issue in respondent's case. The Court also followed to the letter the dictates of Strickland v. Washington, 466 U.S. 668 (1984), in the manner in which it engaged in the prescribed review of the district court's finding regarding the issue of whether respondent received the effective assistance of counsel. The Court of Appeals' opinion neither conflicts with opinions of other circuits nor with any opinions of this Court.[4]

The Court of Appeals' opinion regarding the invalidity of the special circumstance instruction in respondent's case merely follows this Court's holding in Boyde v. California, 494 U.S. 370 (1990), that the "reasonable likelihood" test should be applied to ambiguous jury instructions. Since the instruction in this case was concededly erroneous, the Court of Appeals followed

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[4] Moreover, contrary to petitioner's assertion, the Court of Appeals' interpretation of Boyde did not conflict "with the California Supreme Court's interpretation of Boyde. . . ." See Pet. for Cert. at 17. The California Supreme Court rendered its final decision in this case in 1988, two years prior to this Court's decision in Boyde.

the precedents of this Court in analyzing the harm that may follow from such *erroneous* instructions. See Wade v. Calderon, 29 F.3d 1312, 1321-1322 (9th Cir. 1994). The cases cited by petitioner are inapposite to this situation, and there exists no conflict in the circuits over the approach which should be taken to this category of error. See Pet. for Cert. at 17-18.

A majority of the Court in this case found that respondent received the effective assistance of counsel at the guilt phase of his trial. However, a contrary conclusion was reached as to counsel's performance at the penalty phase of the trial. These conclusions were reached by the straightforward application of Strickland and Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838 (1993), and the Court of Appeals' opinion on this issue presents no significant findings that need be reviewed by this Court.

The Court of Appeals' opinion in this case consists of a proper analysis of the settled law that is applicable to the rather narrow circumstances presented by respondent's case. The petition for writ of certiorari presents no legitimate issues that would warrant this Court's exercise of jurisdiction.

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I

THE COURT OF APPEALS FOLLOWED SETTLED CONSTITUTIONAL PRECEDENTS WHEN IT FOUND THAT THE JURY INSTRUCTION IN THIS CASE FAILED TO NARROW THE CLASS OF CRIMES SUFFICIENTLY TO COMPLY WITH THE EIGHTH AMENDMENT

The portion of the Court of Appeals' opinion which vacated respondent's death sentence[5] addressed a specific isolated issue: whether the *jury instruction* in this particular case failed to sufficiently narrow the class of capital crimes so as to satisfy the Eighth Amendment. See Wade v. Calderon, 29 F.3d at 1319. The Court did not purport to determine any deficiency in California's capital sentencing scheme as a whole. Nor did the Court find any constitutional deficiency in the California "torture-murder" special circumstance.

There is no doubt that under settled California law the instruction in this case was deficient for its failure to specifically require the jury to find that the defendant had the intent to inflict pain. People v. Leach, 710 P.2d 893, 903 (Cal. 1985). The California Supreme Court has recognized that it is only by giving such a specific instruction that the jury is forced to focus on the mental state or culpability of the defendant. It is this requirement that provides a principled basis for distinguishing capital murder from any other murder, and renders this particular special circumstance constitutionally

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[5] Pursuant to California procedure, the Court remanded the case for a new determination regarding imposition of the "special circumstance." Wade v. Calderon, 29 F.3d at 1323, n. 7. Thus, respondent stands convicted of first-degree murder and the state may begin the retrial at the special circumstance stage of the proceedings.

acceptable. People v. Davenport, 710 P.2d 861, 871 (Cal. 1985). That reasoning was adopted and followed by the Ninth Circuit in this case. Wade v. Calderon, 29 F.3d at 1320.[6]

The Court of Appeals' ruling in this case is consistent with both settled California law and the constitutional doctrines of this Court. The Court of Appeals' ruling invalidating the special circumstance finding due to a faulty jury instruction recognizes the underlying validity of the California death penalty scheme as a whole, as well as the constitutionality of the specific special circumstance authorizing respondent's death sentence. In attempting to save this one death verdict, petitioner ignores the distinction between cases which assessed the constitutionality of specific capital punishment statutes and the principles addressed by the Court of Appeals in this case.

The premise of the Court of Appeals' opinion is the unremarkable view that if an otherwise unconstitutional statute is to be saved by a construction that seeks to bring it into line with accepted constitutional doctrine, a jury must be instructed to render its death judgment based upon that construction. This is the same view proffered by this Court in Walton v. Arizona, 497 U.S. 639 (1990), where it held that a death judgment

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[6] Petitioner takes the Court of Appeals to task for reasoning that most murders involve severe pain and that the torture-murder special circumstance only meets constitutional mandates by requiring an intent to torture. See Pet. for Cert., at 24. However, the Court's reasoning in this regard was merely an acceptance of the California Supreme Court's construction of the statute. See Wade v. Calderon, 29 F.3d at 1320 (quoting People v. Davenport, 710 P.2d 861).

pronounced by a jury which utilized an unconstitutionally vague aggravating factor will only survive scrutiny if the jury was given a constitutional limiting definition of the challenged aggravating factor. Id. at 653. It is not sufficient to merely instruct the jury in the bare terms of the statute. Id.

Petitioner apparently relies upon Arave v. Creech, 507 U.S. ___, 113 S.Ct. 1534 (1993), as the principal basis for asserting that this Court needs to grant certiorari in order to settle an important question of federal law. See Pet. for Cert., at 17, 25-27. However, the principles utilized by this Court in Creech were followed by the Court of Appeals in this case.

This Court found in Creech that, "[a]lthough the question is close," the construction placed upon the Idaho statute by the Idaho Supreme Court was sufficient to narrow the class of defendants eligible for the death penalty. Creech, 113 S.Ct. at 1542. This Court's analysis stressed that the limiting construction placed upon the statute served to adequately define the defendant's state of mind. It accomplished this goal because this Court assumed that the terms at issue were used by the legislators in their everyday sense, and interpreted by the sentencing judge in the same manner. Id. at 1543. A key factor in upholding the limiting instruction in Creech was that it focused on the defendant's state of mind, rather than on the outrageousness of the acts constituting the murder. Id. at 1541-1542. Petitioner impliedly suggests in its petition for certiorari that the proper approach should be to focus on the

outrageousness of the acts themselves, rather than the defendant's state of mind. Cf. Maryland v. Cartwright, 486 U.S. 356, 363 (1988) (Court rejects view that outrageousness of facts surrounding a murder are enough in themselves to substitute for constitutionally acceptable narrowing principle).

The Court of Appeals followed the same analytical approach followed by this Court in Creech. It accepted the narrowing construction placed upon the statute by the California Supreme Court and reconciled that construction with this Court's constitutional precepts. The fact that the ultimate result was different than the result reached by this Court in Creech stems from the difference in the circumstances of the case, not from a different application of the law.

This Court made clear in Lewis v. Jeffers, 497 U.S. 764 (1990), that the Eighth Amendment requires the state to "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Id. at 774 (quoting Godfrey v. Georgia, 486 U.S. 420, 428 (1980)). In Creech, the judge was the sentencer, so the question became whether the narrowing construction itself passed constitutional muster. Here, however, since the jury was the sentencer, there was the added factor of whether the narrowing construction was properly conveyed to the jury. The undisputed fact in this case is that it was not. Thus, the sentencer's discretion was not channeled at all, and there was no detailed guidance that would

enable the sentencer to apply the otherwise unconstitutional statute in a manner that narrowed the class of persons eligible for the death penalty.

The fact that petitioner's real complaint in this case relates to the result and not necessarily the Court of Appeals' method of reaching that result is reflected by its concluding paragraphs. Petitioner argues that an intentional killing and the intentional infliction of extreme pain meet the narrowing requirements mandated by the constitution. See Pet. for Cert., at 33. The Court of Appeals' opinion is not to the contrary. Petitioner argues that the statutory scheme in California has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed. Id. The Court of Appeals' opinion is not to the contrary. The Court of Appeals merely found that the trial court did not fulfill its obligations in instructing the jury in a manner that insured the jury would fulfill the dictates of settled California and federal law in rendering its death verdict. The Court of Appeals established no new principles of constitutional jurisprudence and deviated from no accepted norms of constitutional interpretation in reaching this result.

II

THE COURT OF APPEALS PROPERLY ANALYZED THE APPLICABILITY OF BOYDE v. CALIFORNIA TO THE ERRONEOUS PENALTY PHASE JURY INSTRUCTION AT ISSUE IN THIS CASE

Petitioner asks this Court to grant certiorari in order to rectify what it believes to be the Court of Appeals' improper limitation of this Court's opinion in Boyde v. California, 494 U.S. 370 (1990). Pet. for Cert. at 41. In order to do this, petitioner distorts the record as to how respondent's jury was instructed and misinterprets how the Court of Appeals' viewed the challenged instruction.[7] A reasonable examination of the decisions of this Court and the circuit courts, including those circuits cited by petitioner, demonstrates that the Ninth Circuit's application of Boyde to the facts of petitioner's case was faithful to the letter and intent of that decision.

This Court very clearly stated the premise upon which it based its opinion in Boyde:

> The instruction is not concededly erroneous, nor found to be so by a court, as was the case in Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931). The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

Boyde v. California, 494 U.S. at 380. The instruction at issue

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[7] As noted earlier, see p. 13, n. 4, petitioner also engages in historical revisionism by twice referring to how the California Supreme Court applied Boyde to respondent's case. See Pet. for Cert. at 17, 43.

in respondent's case has been found to be erroneous by the California Supreme Court. See People v. Leach, 710 P.2d 893; People v. Davenport, 710 P.2d 861, 871. Thus, by the terms set forth in Boyde itself, a "reasonable likelihood" inquiry is inapplicable to this case. The Court of Appeals merely followed this language from Boyde in reaching the same conclusion. Wade v. Calderon, 29 F.3d at 1321.

Nonetheless, petitioner engages in tortured logic in an attempt to convert an instruction that has been found to be erroneous on its face into one that is ambiguous. Petitioner seeks to accomplish this by asserting that an instruction which totally omits an essential element of a special circumstance is not an erroneous instruction, but merely one that suffers a "latent ambiguity," to which the Boyde reasonable likelihood test may be applied. Pet. for Cert. at 40-41.[8] This approach ignores decades of precedent from this Court holding that an instruction which omits an element of an offense is erroneous. See Bollenbach v. United States, 326 U.S. 607 (1946); United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947);

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[8] Petitioner argues that an instruction permitting the jury to find the existence of a special circumstance by finding an intent to murder and the infliction of pain is merely ambiguous as to whether the jury is being required to find an intent to inflict pain. However, this belief is contrary to logic. Where a jury is given a two-prong instruction, with the first prong requiring a finding that the murder was intentional and the second prong calling for a finding as to whether that intentional murder involved the infliction of pain, the jury will naturally believe that the omission of a requirement that the infliction of pain be done intentionally means that such a finding is not necessary.

see also Cabana v. Bullock, 476 U.S. 376 (1986) (jury instruction which omits mental state element of offense is constitutional error). The Court of Appeals followed the principle recognized in these cases by holding in this case that it was erroneous to omit the essential element of intent to torture from the torture-murder special circumstance. Wade v. Calderon, 29 F.3d at 1320-1321.

Petitioner's approach ignores the fact that this Court has never held instructional deficiencies which omit an essential element to be ambiguous instructions. Rather, instructions that omit or misstate an essential element of a crime or special circumstance have been found to be analogous to instructions which have been condemned for including improper presumptions regarding the existence of an essential element. This comparison is made because both types of instructions deprive the jury of its factfinding role. Carella v. California, 491 U.S. 263, 270 (1989) (Scalia, J., concurring); see Carpenters v. United States, 330 U.S. at 408-409. Thus, this Court has consistently found instructions that include mandatory presumptions to be erroneous instructions because they relieve the prosecution of its burden of proving every element of the offense. Carella v. California, 491 U.S. at 265; Rose v. Clark, 478 U.S. 570, 576 and n. 5 (1986); Sandstrom v. Montana, 442 U.S. 510 (1979); see also Yates v. Evatt, 500 U.S. ___, 111 S.Ct. 1884 (1991).[9]

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[9] Respondent acknowledges that in "rare circumstances" instructions that include presumptions may be considered to be harmless error. Connecticut v. Johnson, 460 U.S. 73, 87 (1983)

Since issuance of the Boyde opinion, this Court has had further opportunity to consider whether Boyde should be interpreted as broadly as the petitioner seems to suggest. In Gilmore v. Taylor, 508 U.S. ___, 113 S.Ct. 2112 (1993), this Court noted the limited basis of the Boyde opinion. Id. at 2117. Justice O'Connor particularly noted that Boyde clarified the circumstances under which the "reasonable likelihood" test would be applied, and that such circumstances existed only when the challenged instruction was ambiguous. Id., 113 S.Ct. at 2121.[10] The Court of Appeals opinion is consistent with this reasoning. Wade v. Calderon, 29 F.3d at 1319-1321.

Further, petitioner cites various court of appeals opinions to claim that there is a conflict among the circuits in the application of Boyde. Pet. for Cert. at 44. However, petitioner fails to cite any case involving the category of instructional error at issue here, omission of an essential element of the offense. Moreover, in support of an alleged conflict with decisions of other circuits, petitioner erroneously

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(plurality opinion). However, in reaching a harmless error inquiry, this Court is acknowledging that such instructions are erroneous instructions and not ambiguous instructions. Further, an instruction which entirely omits an essential element, such as the instruction in the instant case, unlike a presumption affecting a particular element, effectively withdraws that element from the jury's consideration. Cf. Pope v. Illinois, 481 U.S. 497, 503 (1987). Such an instruction is tantamount to a directed verdict as to the omitted element.

[10] Contrary to petitioner's contention, the Court of Appeals opinion in this case is not contrary to the Seventh Circuit decision in Taylor v. Gilmore, 964 F.2d 441, 453 (7th Cir. 1992); see Pet. for Cert. at 44.

cites cases that, not only fail to demonstrate a conflict with the Ninth Circuit's opinion, but indeed support the Ninth Circuit's interpretation of Boyde. The cases cited by petitioner consistently apply the reasonable likelihood test from Boyde to instructions that are ambiguous or confusing. E.g. Williams v. Chrans, 945 F.2d 926 (7th Cir. 1991) (confusing instructions); Free v. Peters, 12 F.3d 700, 703 (7th Cir. 1993) (same); United States v. Merlos, 984 F.2d 1239 (D.C. Cir. 1993) (ambiguity); Parks v. Saffle, 924 F.2d 366 (10th Cir. 1991) (ambiguous instruction interpreted in light of prosecutor's argument); Jefferies v. Blodgett, 5 F.3d 1180, 1195-1196 (9th Cir. 1993) (ambiguous). Notably, petitioner cites a case which explains that the Boyde test is used to determine, in the first instance, whether the claimed ambiguity actually results in error, i.e. is it reasonably likely the instruction "was misunderstood" due to its ambiguous language. United States v. Merlos, 984 F.2d at 1242. If the reasonable likelihood test relates "to the determination of error, leaving open the issue of harmlessness," id., then it cannot rationally apply to an instruction erroneous on its face. For an instruction erroneous on its face, the only remaining question is whether the error may be deemed harmless.

Petitioner also claims the Court of Appeal viewed the erroneous special circumstance instruction in isolation, again allegedly in conflict with other circuits. See Pet. for Cert. at 42, 44; United States v. West, 28 F.3d 748, 750 (8th Cir. 1994). Petitioner's hollow claim is belied by a thorough review of all

relevant jury instructions and the prosecutor's argument, which the Court of Appeals includes in its discussion of whether the omission of the intent element from the special circumstance instruction was harmless error. Wade v. Calderon, 29 F.3d at 1320-1322. Indeed, it is petitioner who relies on an isolated and incomplete recitation of the charge to the jury, to argue that the torture special circumstance instruction was illumined by "the accompanying torture-murder instructions." Pet. for Cert. at 36-37.

In contrast, the Court of Appeals directly addressed the effects of the instructions regarding guilt of first degree murder, on both of the theories presented to the jury, murder by torture and premeditated murder. Id. at 1320, 1322. The Court of Appeals also noted the *intervening* instructions, glossed over by petitioner, that directed the jury on how to proceed in their verdicts as to guilt and the findings as to the special circumstances.

> The jury was instructed that, if it found Wade guilty of murder in the first degree, it "must *then* determine if the murder was committed under one or both of the . . . special circumstances." (Emphasis added.) The jury was then instructed on exactly which facts it must find in order ultimately to find the torture-murder special circumstance, and intent to inflict extreme pain was not among them.

Id at 1320. The Court of Appeals recognized that the jury was following a two-step process; once the jury reached a first degree murder verdict, on either theory, then it had new and different instructions to follow in determining the existence of the special circumstances.

Both petitioner and the California Supreme Court were similarly selective in their characterization of the prosecutor's argument on this point. In any event, the Court of Appeals reviewed the entirety of the relevant argument and found it could not render the constitutional error harmless. Id. at 1321; compare id. at 1321, n. 4, with Pet. for Cert. at 38. Ultimately, petitioner simply disagrees with the result the Court of Appeals reached and as a consequence reaches out in an attempt to graft an issue concerning an entirely different category of instructional error into a case where that error was neither claimed nor found. As noted in Argument I, ante, the Court of Appeals held that the torture special circumstance instruction was erroneous on its face, applying the correct standard set forth by this Court in Walton v. Arizona. Wade v. Calderon, 29 F.3d at 1320. Then the Court of Appeals proceeded to the question of whether the error was harmless, and again applied the correct standard as set forth by this Court in Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710, 1722 (1993). Wade v. Calderon, 29 F.3d at 1322. Accordingly, there is no issue worthy of this Court's review and the petition should be denied.

III

THE COURT OF APPEALS CORRECTLY APPLIED SETTLED CONSTITUTIONAL PRECEDENTS WHEN IT FOUND THAT TRIAL COUNSEL'S INEFFECTIVENESS DENIED RESPONDENT A FAIR AND RELIABLE PENALTY TRIAL

After careful examination of the entire record, the Court of Appeals evaluated trial counsel's failure to adequately prepare and present a penalty phase defense according to well-established standards applicable to claims of ineffective assistance of counsel. Wade v. Calderon, 29 F.3d at 1323-1325. The Court of Appeals faithfully employed both steps in the analysis required by Strickland v. Washington, 466 U.S. 668, first identifying where counsel's performance fell below that of a reasonable attorney, and then determining whether those failures were so prejudicial as to deny respondent a fair and reliable penalty trial. Id. at 687; see Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838 at 842-843. At no point did the Court of Appeals depart from these legal standards. Petitioner does not suggest otherwise. Rather, petitioner accuses the Court of Appeals of using hindsight, and then selectively and unsuccessfully distorts the record in an attempt to make the Court of Appeals' reasoned factual analysis appear to be hindsight. Ultimately, petitioner simply disagrees with how the Court of Appeals viewed the facts in this particular record in light of settled constitutional standards.

From the outset, the Court of Appeals acknowledged the two components necessary to respondent's claim that his trial counsel was ineffective:

> In order to demonstrate that his counsel was ineffective, Wade must show that counsel's performance fell below that of a reasonable attorney and that counsel's errors created a reasonable probability that, but for the errors, the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

Wade v. Calderon, 29 F.3d at 1316. Although the Court of Appeals considered trial counsel's performance at the guilt phase "troubling," id., it ultimately held "that counsel's performance at the guilt phase did not deprive Wade of a fair trial." Id. at 1319. Although respondent disagrees with this holding, the Court's analysis demonstrates that it understood that the "touchstone of an ineffectiveness claim is the fairness of the adversary proceeding." Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. at 843; Strickland v. Washington, 466 U.S. at 687.

Furthermore, the Court of Appeals expressed its obligation to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Wade v. Calderon, 29 F.3d at 1316 (quoting Strickland, 466 U.S. at 689). Throughout its analysis of trial counsel's entire performance, the Court of Appeals gave deference to counsel's acts or omissions that could reasonably be termed "strategic choices." See Strickland, 466 U.S. at 690-691. However, despite indulging in the presumption of reasonableness required by Strickland, the Court of Appeals found trial counsel's errors at the penalty phase could not reasonably be considered tactical choices. The effect of those errors can be summarized into two basic points. First, and perhaps foremost,

by his acts and omissions as to the presentation of evidence, trial counsel effectively denied respondent the presentation of any mitigating evidence at all, despite the availability of potentially forceful mitigating evidence. Wade v. Calderon, 29 F.3d at 1323-1324. The petition never addresses trial counsel's failure to present any mitigating evidence, a cornerstone of the Court of Appeals' finding of ineffectiveness. Second, by capitulation at the outset of his argument, and then arguing that executing respondent would be to his benefit, thereby inviting a death verdict, "counsel's argument resulted in the 'breakdown in the adversarial process that our system counts on to produce just results'." Id. at 1324 (quoting Strickland, 466 U.S. at 696) (note omitted). Thus, the Court of Appeals concluded "that counsel was ineffective in his representation at the penalty phase, and because of his ineffectiveness, Wade was denied a fair and reliable penalty trial." Wade v. Calderon, 29 F.3d at 1325.

Petitioner distorts the record and procedural history in this case, and applicable standards of review, to contend that the Court of Appeals used hindsight to reach this conclusion. Petitioner claims this was a hopeless case because the facts of the crime made a determination of guilt of capital murder a foregone conclusion. Notwithstanding the questionable validity of that assumption, it fails to support petitioner's claim that trial counsel's acts or omissions at the penalty phase of respondent's case are therefore due "even greater deference" than would otherwise be the case. Pet. for Cert. at 56-57.

As part of this hopelessness allegation, petitioner asserts that no mental health experts or investigators "could find evidence of a mental defense before Wade's trial." Pet. for Cert. at 56; see id. at 20. Petitioner's assertion is flatly refuted by the reports of mental health experts appointed to assist trial counsel's predecessor, Mr. Greenberg, as well as by the report of at least one expert hired by Mr. Ames himself. See II ER at 155-196, reports of Drs. Chapman (9/7/81), Lawrence (10/6/81), and Summerour (2/26/82). Moreover, to the extent that the conclusions of trial counsel's experts were not obtained before trial, it is Mr. Ames who is responsible for failing to provide them with sufficient opportunity to examine respondent and then report back to counsel before jury selection commenced. In any event, petitioner misperceives trial counsel's failing at the penalty phase; by the time the case reached a penalty phase, trial counsel had significant mitigating evidence available to him, but failed to obtain such evidence or present it to the jury. Again, petitioner never addresses trial counsel's failure to present mitigating evidence to the jury.

Petitioner suggests that the Court of Appeals disregarded the district court findings of historical fact, such as a conclusion that trial counsel's penalty representation was reasonable. Pet. for Cert. at 45. However, the reasonableness of counsel's representation, i.e. whether he was ineffective, is indisputably a mixed question of law and fact. Strickland, 466 U.S. at 698. Petitioner also suggests that the Court of Appeals

has second-guessed "every judge who has heard the case over a twelve year period." Pet. for Cert. at 59. Petitioner ignores the fact that on direct appeal, without the benefit of the extra record matters discovered during the habeas corpus proceedings, three justices or former justices of the California Supreme Court concluded that trial counsel's performance was ineffective at guilt, penalty or both phases of the trial. See Wade v. Calderon, 29 F.3d at 1324, n. 9.[11] Evidently, petitioner decided that it was necessary to ignore adverse portions of the record, or affirmatively distort the record, and thereby cast the Court of Appeals decision in a false light, in order to persuade this Court that the opinion is overreaching and based upon hindsight. However, the Court of Appeals properly reviewed the entire record presented to the district court and then applied the settled Sixth Amendment principles of this Court in arriving at their decision. Accordingly, there is no constitutional question worthy of this Court's review and the petition should be denied.

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[11] To the extent that a majority of the California Supreme Court made any determination as to trial counsel's competency, that finding was based upon the appellate record standing alone, and limited to the issue discussed in its opinion, whether trial counsel was ineffective in his argument. People v. Wade, 750 P.2d 794. The state court did not conduct any habeas corpus evidentiary proceedings and made no findings whatsoever regarding respondent's claims.

CONCLUSION

For the aforementioned reasons, this case does not present any constitutional issue worthy of review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

DATED: December 21, 1994

Respectfully submitted,

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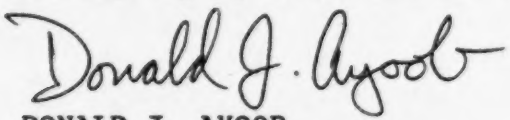

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